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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

THE CHEROKEE NATION.

No. 846.

When Supreme Court U. S.

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JAMES T. K. CONNELLY, CL.

THE EASTERN CHEROKEES, APPELLANTS,

v.

THE CHEROKEE NATION.

No. 347.

THE CHEROKEE NATION, APPELLANT,

v.

THE UNITED STATES.

No. 848.

APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE  
UNITED STATES.

LOUIS A. PRADT,

Assistant Attorney-General.

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*APPEALS FROM THE COURT OF CLAIMS.*

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## SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

This additional brief is made in reply to certain portions of the brief for the Cherokee Nation, which brief was received by the counsel for the United States very shortly before the argument of the case in this court. It is also in reply to certain contentions at the oral argument by counsel for claimants to which counsel for the United States did not have time to then answer.

**The Slade and Bender Account.**

By stating the account from the standpoint of the Cherokees as to the item here in question, Slade and Bender constituted themselves, in effect, the agents of the Cherokees, and their statement of the account as to this item was thus virtually the statement of the Cherokees, requiring the acceptance of the United States to give it the character of an account stated. This acceptance it never received.

As to the provision in the agreement for the payment by Congress of amounts found on such accounting to have been withheld by the United States from the Cherokee Nation, the account showed three just such items (for which judgment has been rendered in this action), and to that extent was just such an account as was intended by the agreement. And thus this particular provision was made effectual.

And now, following up this line of inquiry, counsel for claimants have not met the proposition of the United States that every provision of the agreement should, if possible, be given force and effect, and that this could only result through a statement of the account as it appeared on the books of the United States, thus allowing the Cherokees an opportunity to test in the courts the action of the United States in charging a part of the cost of removal to the five million dollar treaty fund, and so giving effect to the provision in the agreement for the accounting for precisely such action.

Counsel for claimants have quoted with approval the report of the Commissioner of Indian Affairs to the Secretary of the Interior commenting upon this very

agreement. But in that report the Commissioner pointed out that the agreement seemed to call for exactly such a statement of the account as is contended for by the United States, using the following language:

If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least \$5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement, herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose. (Rec., p. 405.)

Congress, in making provision for the appointment of the accountants, acted directly in line with this suggestion. (Rec., p. 107.) And was it not, therefore, the sole duty of those accountants, so appointed, "*to review and copy the Cherokee accounts and records?*"

Accordingly there arises this question, which has not as yet been answered:

If Slade and Bender had rendered an account which, in the above language of the Commissioner of Indian

Affairs, had been a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds, under the treaties and acts of Congress referred to in the agreement of the treaty of 1893, providing for such accounting, would it not have been a full and complete compliance with all the provisions of that agreement? And would there not then have been this marked but most reasonable and logical difference in the situation, that thereupon the questions of law involved in this claim of the Cherokees would have been, through the suit provided for in the same agreement, presented for determination by the courts, instead of being prejudged by the accountants? And what possible ground of complaint would there have then been on the part of either the Cherokees or the United States?

There is urged in support of the contention that it was intended that the account should be stated on the legal theory of the Cherokees, that in the preliminary negotiations upon which followed the agreement of 1891, which was the basis of the treaty of 1893, the Commissioners who acted for the United States in the negotiations said, among other things:

The Government has made the accounting; has kept the books; has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected.

But this language is in entire consonance with the theory of the Government as to the accounting.

It will be noted that what is contemplated is that there shall be a restatement of the whole account as kept by the Government in its own books and according to its own construction of the treaties; that if this had been done properly—that is, accurately and according to law—it would, of course, be satisfactory; but if it had not been done properly—that is, if in the opinion of the Cherokees either the mathematics were at fault or the Government's construction of the treaties was unwarranted—then the error could be corrected. That is to say, it was the statement of the account itself which would present the questions of error, if any, on the part of the United States to be corrected. And how corrected? By the courts, as provided for in the agreement.

At the oral argument counsel for the Eastern Cherokees stated that in the Slade and Bender account there is charged against the Cherokees for debts and claims upon the Cherokee Nation \$101,348.31 (Slade and Bender account, p. 23); whereas this court, in the *Old Settlers* case, had decided two years before that this item should be \$60,000 (148 U. S., p. 477). The purpose of counsel was to show that Slade and Bender had not in all respects favored the Cherokees in their account, but unwittingly he has here furnished the strongest evidence of the bumptiousness and incompetency of those accountants in their assumed rôle of chancellors, in that they were either ignorant or careless of all judicial decisions, being a law unto themselves.

Another significant fact is that during these negotiations the Cherokees were asserting a claim for not only the principal but interest. This claim for interest was essentially one to be decided by the courts and not by the accountants, as there was nothing in the treaties named that had any reference to interest. And the best evidence of the unfitness of these accountants to deal with that question is to be found in the fact that they allowed interest on the claim here in dispute without giving any reason for the same.

Finally, if a report on the legal theory of the Cherokee Nation were intended, why did not the agreement in the treaty of 1893 so recite in terms?

#### **The jurisdictional act of 1902.**

In urging this claim upon the basis of the Slade and Bender account, counsel for claimants seem to have utterly lost sight of the jurisdictional act under which this action is brought. That act gives jurisdiction to the Court of Claims to examine, consider, and adjudicate, with a right of appeal to this court, any claim which the Cherokee tribe, or any band thereof, may have against the United States arising under treaty stipulation. Prior to the passage of this act Congress for a long time had been besieged by the claimants to allow this claim upon the basis of the Slade and Bender account, yet the act makes no reference whatever to that account, but provides instead for an examination into the treaties out of which it was alleged by the Cherokees their claim arose.

Now conceding for the sake of argument that the Slade and Bender account was binding upon the United States at the time on the theory of the claimants in this action, it was then a settlement of this claim, but in 1851 the Western and Eastern Cherokees, acting separately, but altogether constituting the Cherokee Nation, made complete settlements of all their claims against the United States. So that when this jurisdictional act was passed this claim had been the subject of two settlements, one in favor of the United States and the later one in favor of the Indians, this later one ignoring the prior settlement of 1851. Now is it not clear from the language of this jurisdictional act that the court is warranted in going back of both of these settlements to inquire into the very merits of this claim, and is there any consistency or justice in the contention of the claimants that their solemn settlement of 1851 should be ignored and only the alleged settlement of the Slade and Bender account be made effective? There is certainly much significance in this reluctance on the part of counsel for the Cherokee Nation to have the merits of this claim decided irrespective of any and all alleged settlements thereof. To be sure when this action was brought in the Court of Claims, the claimants contended that the Slade and Bender account was an award, and that contention, if it could have been maintained, would of course have precluded all further inquiry on the principle of *res adjudicata*, but on this appeal that contention has been for manifest reasons abandoned and the Slade and Bender account is relied

upon as an account stated; that is a settlement of this claim between the United States and the Cherokees.

But, say counsel for the Cherokee Nation, whilst it is true that the Western and Eastern Cherokees, as individuals, have given receipts in full of all claims on their part arising out of these various treaties against the United States, and whilst it is true that the Western and Eastern Cherokees together constitute the Cherokee Nation, nevertheless the Cherokee Nation, as such, never made any settlement nor gave any receipt for this claim, and therefore is now free to assert it despite those settlements. As stated, this proposition has a very dubious sound, and in the light of the facts it has no foundation whatever. In the settlement made by the Western Cherokees each of them receipted in full of all demands under the provisions of the treaty of the 6th of August, 1846, according to the principles established in the fourth article thereof, and in compliance with the appropriation act of September 30, 1850, which each receipt recited, that the money thus paid was to be in full of all such demands. Subsequently, in the *Old Settlers' case*, this settlement was reopened, and the Western Cherokees were allowed to assert any and all further claims on their part against the United States.

Those claims were considered and judgment rendered as to a portion of them in favor of the Western Cherokees, which judgment was thereafter paid in full by the United States. Thus, clearly, the Western Cherokees, as such, have no standing whatever in this action, having already had their full day in court.

Furthermore, the Western Cherokees never had, nor asserted, any interest whatever in this claim. In the settlement which was made with them in 1851 the cost of removal with which they were charged did not diminish the five-million dollar treaty fund one cent, but came entirely from the \$600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the fourth article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to a third. Hence, it was the Eastern Cherokees only who were interested in the actual residuum of the treaty fund, and thus it was that article nine of that treaty made provision for the payment to Eastern Cherokees only, of that balance and provided for a fair and just settlement of all moneys due to the Cherokees and for a payment of the same per capita to the Eastern Cherokees.

Hence, whatever was found due under this settlement was to be the property, not of the Cherokee Nation, but of individual Eastern Cherokees per capita. Accordingly, the Cherokee Nation, as such, had no interest at the time in this claim and were connected with it simply because they officially represented the Eastern Cherokees, or, as Mr. Owen puts it, the term *Cherokee Nation* meant *Eastern Cherokees*. And accordingly, because of this representative relation to the Eastern Cherokees of the Cherokee Nation, Congress, by the act of February 27, 1851, appropriated the amount due on the accounting provided for by

article 9 of the treaty of 1846 for payment to the Cherokee Nation, with the further provision that it should be in full satisfaction and final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States under any treaty heretofore made with the Cherokees, and with the further provision for a receipt in full of all such claims when said appropriation was paid. But since, as above stated, this money was due to the Eastern Cherokees, individually, and the Cherokee Nation as such had no interest in it whatever, the receipts provided for under this appropriation were executed by the individual Eastern Cherokees, and each of them recited the proviso of the appropriation act requiring the Cherokee Nation to execute a full and final discharge of all claims and demands whatsoever against the United States. Therefore, for the Cherokee Nation to now say that this was not in effect and in essence a settlement of this claim by the Cherokee Nation, so far as it can be said to have had any interest whatever in said claim, is to palter with the facts.

Equally extraordinary and unfounded is the contention made on behalf of the Eastern Cherokees that in the settlement made and receipts given by them in 1851 this claim was not included, because of the exception in the appropriation act from the operation of such receipts of "such moneys and lands, if any, as the United States may hold in trust for said Cherokees." The sum here claimed, it is contended, was covered by this exception because it

was held in trust for the Cherokees. There is not a shadow of foundation for this statement. The sum here claimed was deducted from the five million dollar fund. If it had not been so deducted it would have increased to that extent the amount to be distributed per capita among the Eastern Cherokees as they allege themselves in their petition. Accordingly when the account with the Eastern Cherokees, pursuant to article 9 of the treaty of 1846, was made, and when the Eastern Cherokees, in 1851, made their settlement and gave their receipts in full of all claims against the United States on the basis of that account, they settled and gave receipts in full for all claims for money arising out of the treaty fund for per capita distribution; thus directly receipting in full, for this very claim. That they did so with full and actual knowledge thereof is evidenced by the fact, that prior to such settlement they made a protest against the accounting, based first of all upon the contention that no part of the cost of removal should have been charged against the treaty fund as had been done in the account (Rev., p. 98), which is precisely the claim here under consideration.

Furthermore, counsel for the Eastern Cherokees have repeatedly reiterated that this claim has always and on all possible occasions been asserted by the Eastern Cherokees ever since it first arose. Finally, the exception of moneys held in trust by the United States by the Cherokees which the Eastern Cherokees here pretended to rely upon manifestly relates to actual

trust funds, such as the \$500,000 which were devoted to various trust purposes out of the treaty fund of the treaty of New Echota; whereas the amount here claimed, if it had been allowed the Cherokees in the settlement of 1851, would, instead of being held in trust for the Cherokees, have been paid under article 15 of the treaty of 1835 and article 9 of the treaty of 1846 directly to the individual Eastern Cherokees per capita. Hence, the contention that the settlement of 1851 by the Eastern Cherokees did not cover this claim, is not only unwarranted but is unworthy.

It was stated at the oral argument by the counsel for the Eastern Cherokees that after the treaty of 1835 the Eastern Cherokees had no more dealings with the United States. This is a remarkable assertion when it is remembered that the Eastern Cherokees were parties to the subsequent treaty of 1846, concerning which treaty the court stated, in the case of the *Western Cherokees v. The United States* (27 C. Cls., p. 36):

That treaty was a compact between three parties—the United States, the Eastern, and the Western Cherokees. Its purpose was to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be, and to secure peace in the Cherokee country.

The counsel for the Eastern Cherokees are under a curious misapprehension as to the purposes of the appropriation of June 12, 1838. Their idea of this appropriation is that the whole of it was intended primarily for removal because the language of the

appropriation act recited that a portion of it was to be in aid of subsistence. This counsel interprets to mean that such portion was to be used for subsistence as might be left after the cost of removal had been paid from the appropriation. But counsel forgets that this appropriation was made with direct reference to an estimate of the Secretary of War, which estimate designated but \$435,900 for removal and all the remainder as the estimated cost of subsistence. Hence the provision of the appropriation act as to *aiding* in subsistence meant simply that the amount estimated by the Secretary of War as the cost of subsistence was appropriated for that purpose, but that a further appropriation for the same purpose might follow if necessary. But the same appropriation act made the amount estimated by the Secretary of War as the cost of removal together with what remained of the \$600,000 fund for that purpose, a fund *in full for the cost of removal*. See report of the committee having under consideration the proposition to make a further appropriation for subsistence under article 11 of the treaty of 1846, quoted in the *Old Settlers'* case in this court (148 U. S., at p. 452), and cited in the main brief in this case on page 85.

#### Interest.

In the course of the argument of counsel for the Cherokee Nation it was stated that in the negotiations preceding the articles of the agreement of December 19, 1891, which articles became a part of the treaty of

1893, the Cherokees asserted a claim for interest as well as principal. So far as this fact is relied upon to show that at the time of the adoption of said agreement the United States was aware that the Indians asserted a claim for interest, it is, of course, perfectly correct. But it is difficult to see how the fact that the Indians claimed interest constitutes in itself any argument to support that claim.

*Alleged trust funds.*

But the counsel for the Eastern and emigrant Cherokees makes the serious contention that the money which is the subject of this claim was a part of an interest-bearing trust fund, and therefore should be restored with interest from the time that it was taken from such fund.

This contention seems to be urged also, with some modifications, by other counsel for claimants. It is, however, not supported by the facts. The only part of the five million dollar treaty fund that was a trust fund was the sum of \$500,000.

As for the particular sum which is here claimed, if it had not been used to pay a part of the cost of removal of the Cherokees under Article 15, of the treaty of 1835, and Article 9, of the treaty of 1846, it would have been distributed per capita to the Eastern Cherokees, and hence it had not and never could assume the character of a trust fund, much less an interest-bearing trust fund.

As has already been pointed out, the interest that was paid upon the amounts due under the accounting

with the Western and Eastern Cherokees, pursuant to the treaty of 1846, was so paid because the Senate, by resolution, decided that it ought to be paid. There is nothing in the resolution itself to show the reasons for this conclusion, but obviously it was because the payments of these amounts had been delayed beyond the two years within which it was expected that the Indians would be all removed under the treaty of New Echota, and when therefore the accounts with the Indians could be closed and the per capita distribution made. For this delay the Senate clearly held the United States at fault, and therefore allowed the interest. At any rate it is perfectly clear that the interest was not allowed because these amounts were a part of an interest-bearing fund, nor because of any provision in either of the treaties or in any statute relating thereto, providing for the payment of interest.

Another argument advanced on this subject is that the United States have conceded the allowance of interest on the three smaller items found due the Indians in the Slade and Bender account. The following recital, however, fully explains why that concession was made by the United States and completely meets this argument.

The \$2,125 found due under the treaty of 1819 was the value of lands which should have been sold for the benefit of the school fund of the Cherokees, which was interest bearing. (S. & B. Report, 3 and 4.)

The \$432 found due under the treaty of 1866 was an admitted balance on sales of the Cherokee Strip,

which should have been added to interest-bearing trust funds. (S. & B. Report, 26 and 27.)

The \$20,406.25 found due under the act of March 3, 1893, was interest on \$15,000 of Choctaw funds, which \$15,000, in 1863, was inadvertently used for relief of indigent Cherokees. The error was discovered in 1890 and the \$15,000 was restored from interest due upon the Cherokee national funds. This interest amounted in 1893 to the above amount of \$20,406.25, diminishing the national trust fund to that extent through the error of the United States. Accordingly, the United States was in duty bound to make this diminution good, and as it was a trust fund thus diminished, to pay interest upon it. (*S. & B. R. 29*)

Thus it appears that, as to all items of their account but the one here in question, Slade and Bender allowed interest for good and sufficient reasons.

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